Supreme Court, U.S.
FILED
DEC 15 2010
OFFICE OF THE CLERK

No. 10-130

IN THE

Supreme Court of the United States

ZHAN GAO,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Amy Howe
Counsel of Record
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
ahowe@howerussell.com

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES.....ii
REPLY BRIEF FOR PETITIONER 1
CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Abbott v. Abbott, 130 S. Ct. 1983 (2010) 6

Alaka v. Attorney General, 456 F.3d 88 (3d Cir. 2006) 1, 2

Ali v. Achim, 551 U.S. 1188, *cert. dismissed*, 552 U.S. 1085 (2007) 1

Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 1, 2, 3

In re N-A-M-, 24 I.& N. Dec. 336 (2007) 1, 2, 3

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 5

Negusie v. Holder, 129 S. Ct. 1159 (2009) 3

Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350 (D.C. Cir. 2006) 3

Quiceno v. Attorney Gen. of the United States, 304 Fed. Appx. 40 (3d Cir. 2008) 3

Statutes

8 U.S.C. § 1101(a)(43) 8

8 U.S.C. § 1158(b)(2)(A)(ii) 11

8 U.S.C. § 1158(b)(2)(A)(iv) 12

8 U.S.C. § 1158(b)(2)(B)(iii) 7

8 U.S.C. § 1231(b)(3)(B) 4

8 U.S.C. § 1231(b)(3)(B)(ii) 11

8 U.S.C. § 1231(b)(3)(B)(iv) 12

Other Authorities

Gov't BIO, *Ali v. Achim* (No. 06-1346) (July 11, 2007) 2

Gov't Br., *Quiceno v. Mukasey* (3d Cir. Mar. 20, 2008) 3

H.R. Conf. Rep. No. 96-781 (1980) 5

H.R. Rep. No. 96-608 (1979) 5

Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)compliance with Its Duty of Non-Refoulement*, 2 Yale Hum. Rts. & Dev. L.J. 183 (1999) 10

U.S. Cert. *Amicus* Br., *Abbott v. Abbott*, 130 S. Ct. 1983 (No. 08-645) (May 2009) 6

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/1P/4/Eng/Rev.2 (1979) (1992 ed.) 5

Regulations

8 C.F.R. § 208.14(e) 7

8 C.F.R. § 208.16(f) 7

8 C.F.R. § 208.22 7

Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (1999) 6

REPLY BRIEF FOR PETITIONER

1. The Government acknowledges, BIO 17, that this case presents the precise question that this Court granted certiorari to decide in *Ali v. Achim*, 551 U.S. 1188 (2007): whether, for purposes of withholding of removal, "particularly serious crimes" are limited to aggravated felonies. The parties in *Ali* voluntarily dismissed the case before oral argument, leaving the circuit conflict on that important and recurring question unresolved. 552 U.S. 1085 (2007).

The Government does not deny the existence of the circuit split. Instead, it hypothesizes that the split does not "now" warrant review because the Third Circuit might reverse itself in light of the Board of Immigration Appeals' (BIA) reiteration of its contrary position in *In re N-A-M-*, 24 I.& N. Dec. 336, 338 (2007). But as the petition explained, Pet. 15, there is no prospect that the Third Circuit will reverse course. The Third Circuit decided *Alaka* in the face of the BIA's "consistent practice" to the contrary. *See N-A-M-*, 24 I. & N. Dec. at 338-39 (explaining that the BIA had issued "numerous decisions" over the years reflecting its "understanding that the classification of an offense as a 'particularly serious crime' is not limited to offenses that are aggravated felonies").

The Government's brief in opposition in *Ali v. Achim* confirms that the Board's decision in *N-A-M-* was a continuation of past practice, not a "watershed" moment that would cause the Third Circuit to reverse course. In urging the Court to deny review in that case, the Government made precisely the same argument that it makes now: the Board's interpretation is entitled to *Chevron* deference, and

certiorari is not warranted because the Third Circuit in *Alaka* had failed to consider agency deference entirely. *Compare* Gov't BIO 11, 14-15, *Ali v. Achim* (No. 06-1346) (July 11, 2007) *with* BIO 13, 17-18. The Government's brief in *Ali* also acknowledged that the Board's interpretation was longstanding. *See* Gov't BIO 11, *Ali* (citing *In re L-S-*, 22 I. & N. Dec. 645, 651 (B.I.A. 1999)).

In any event, the Third Circuit's holding that the statutory text is unambiguous disposes of the Government's contention that the court of appeals would be compelled to revisit its position under *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), which requires no deference in such a case: "If the intent of Congress is clear, that is the end of the matter." The Third Circuit regarded the statute as establishing unambiguously that the class of "particularly serious crimes" is limited to aggravated felonies: "The *plain language and structure* (*i.e.*, context) of the statute indicate that an offense *must be* an aggravated felony to be sufficiently 'serious'" to deny withholding of removal. *Alaka v. Attorney General*, 456 F.3d 88, 104 (3d Cir. 2006) (emphases added). Because the statute remains unchanged, nothing in *N-A-M-* would alter that settled conclusion.

Lest there be any doubt, the Third Circuit recently reiterated that conclusion, specifically acknowledging the BIA's contrary ruling in *N-A-M-* (which the Government had cited repeatedly in its briefs in that case) but reaffirming that "[i]n the withholding of removal context, a particularly serious crime is an aggravated felony for which the alien was sentenced to five years imprisonment or an

aggravated felony that the Attorney General deems a particularly serious crime." *Quiceno v. Attorney Gen. of the United States*, 304 Fed. Appx. 40, 43-44 (3d Cir. 2008).[1]

The Government's contention that the Third Circuit would now defer to the BIA fails for the further reason that the BIA rested its decision in *N-A-M-* on a supposed "plain reading of the Act," *In re N-A-M-*, 24 I. & N. Dec. 336, 338 (2007), which the Government seemingly acknowledges is not subject to deference. *See* Pet. 22-23; *Negusie v. Holder*, 129 S. Ct. 1159, 1166-67 (2009) (holding that the BIA, in considering itself bound by the "plain language" of a statute and a court decision, "has not yet exercised its *Chevron* discretion"); *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). The very fact that the BIA and the Third Circuit read the same text to compel opposite conclusions strongly supports this Court's intervention to resolve the impasse.

2. Only the Third Circuit's reading of the withholding of removal statute properly accounts for the statute's text and Congress's intent. As the petition explains, the statute specifies that one type of offense is *per se* "particularly serious" for purposes of withholding of removal: an "aggravated felony (or felonies) for which the alien has been sentenced to an

---

[1] The Third Circuit did so notwithstanding the Government's contention that "the Attorney General may also determine that any aggravated felony that resulted in a sentence of less than five years qualifies as particularly serious." Gov't Br. 9, *Quiceno v. Mukasey* (3d Cir. Mar. 20, 2008).

aggregate term of imprisonment of at least 5 years." 8 U.S.C. § 1231(b)(3)(B). *See* Pet. 25. The statute then confers on the Attorney General a specified, limited authority to designate *additional aggravated felonies* as "particularly serious": "The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." *Id.*

That statutory structure – in which the Attorney General's authority is directly tied to the designation of aggravated felonies as particularly serious crimes in "[t]he previous sentence" – is completely inconsistent with the Government's assertion that the withholding provision broadly "grants the Attorney General the discretionary authority to decide if a crime is particularly serious with the only limitation being that some aggravated felonies *are per se* 'particularly serious,'" BIO 13. The Government's position that it may deem *any* crime "particularly serious" renders the phrase "notwithstanding the length of sentence imposed" meaningless and deprives of all force Congress's designation of aggravated felonies as particularly serious crimes. Under the Government's reading, the only check on the Attorney General's designation is case-by-case litigation over what sorts of crimes are "particularly serious" – an understanding that this Court's Eighth Amendment proportionality jurisprudence suggests courts are ill-equipped to conduct.

Moreover, the Government's construction of the withholding provision should be rejected as contrary to Congress's intent because it places the United

States in violation of its treaty obligations. The Government does not dispute that Congress enacted the Refugee Act of 1980 to "bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (citing H.R. Rep. No. 96-608, at 9 (1979)), and that it intended the Act's two *nonrefoulement* exceptions to be "construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980). Nor does the Government dispute that, under the Protocol, a "particularly serious crime" is the equivalent of "a capital crime or a very grave punishable act." UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 155, U.N. Doc. HCR/1P/4/Eng/Rev.2 (1979) (1992 ed.).

The Government asserts, however, that because the Refugee Convention and Protocol "do not define what types of crimes are sufficiently serious to qualify as particularly serious crimes," Congress possesses "wide latitude" to define that category for itself. BIO 16 n.8. That logic merely begs the question of what Congress in fact intended. Petitioner argues not that the statute is invalid because it conflicts with the Protocol, but instead that the statute should be construed to be consistent with the Protocol. *See* Pet. 19 (citing H.R. Rep. No. 96-781, at 20 (1980)). This Court should not assume that Congress intended *sub silentio* to authorize the Attorney General to adopt a reading of "particularly serious crime" contrary to the Protocol.

3. There is no merit to the Government's contention that this case is not a suitable vehicle for this Court's review because of the possibility that on remand petitioner's tax conviction might be deemed an "aggravated felony." *See* BIO 25. At the urging of the Government, this Court routinely grants review in cases in which on remand the petitioner might not ultimately prevail. *E.g.*, *Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010) (ruling in petitioner's favor on the question presented but indicating that "[t]he proper interpretation and application of these and other exceptions [to the Hague Convention on the Civil Aspects of International Child Abduction] . . . may be addressed on remand"); U.S. Cert. *Amicus* Br. 21, *Abbott v. Abbott*, 130 S. Ct. 1983 (No. 08-645) (May 2009). And, in any event, it is hardly "likely," BIO 26, that petitioner's tax fraud conviction is an "aggravated felony." The Immigration Judge concluded that it is not. Pet. App. 146a. Neither the BIA nor the Fourth Circuit reached this issue, *id.* 43a, 12a, and (as the Government acknowledges) other courts of appeals have given conflicting guidance on this issue, *see* BIO 26 (citing cases).

Nor does Gao's entitlement to deferral of removal under the Convention Against Torture render this case a poor vehicle. Although the Government posits that deferral of removal provides Gao with "much the same relief" as withholding, BIO 24, that assertion is belied by the Government's own regulations, which make clear that deferral of removal provides "a less permanent form of protection than withholding of removal . . . [because it] is more easily and quickly terminated if it becomes possible to remove the alien consistent with" the Convention. *Regulations*

Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8480 (1999). The Government also ignores that asylum, which Gao also seeks, is a still more desirable form of relief, as it would allow Gao to remain in the United States permanently. 8 C.F.R. §§ 208.14(e), 208.16(f), 208.22.

4. In fact, this case presents an ideal vehicle for the Court to resolve not only the question whether "particularly serious crimes" are limited to aggravated felonies for purposes of withholding, but also two closely related questions: what constitutes a "particularly serious crime" for purposes of asylum, and whether a non-citizen seeking withholding and asylum is entitled to a prospective, individualized determination about whether she constitutes a danger to the community. As the petition explains, the statutory provision governing withholding directly parallels the provision governing asylum. Pet. 23. Both are rooted in the identical requirement that a non-citizen is ineligible for relief if, "having been convicted by a final judgment of a particularly serious crime," she is "a danger to the community." Moreover, because the statutes so closely mirror one another, each statute's definition of what constitutes a "particularly serious crime" informs the other. *Id.*

Like the withholding provision, Section 1158(b)(2)(B)(iii) indicates that one category of crimes – here, aggravated felonies – is *per se* particularly serious for purposes of asylum. The statute then further provides that "the Attorney General may designate additional crimes" as particularly serious "by regulation." The Government argues that Congress's use of the word "may" rather than "must" suggests an intent to provide the Attorney General

with the authority to designate additional offenses as "particularly serious" either by regulation or on a case-by-case basis. BIO 20. But the Attorney General is already presumed to have the authority to choose between two kinds of rulemaking, *see* Pet. App. 14a; the only reason for Congress to expressly identify designation "by regulation" would be to *limit* the Attorney General's options. As with its argument about withholding, the Government's construction would strip a portion of the statute of all meaning, rendering it surplusage. Pet. 24.[2]

Nor would requiring the Attorney General to proceed "by regulation" impose an unjustifiable burden. *But see* BIO 20. Rather, the Attorney General could satisfy the statute by issuing regulations designating categories of non-aggravated felonies as particularly serious crimes, just as Congress already has done by statute for "aggravated felonies." *See, e.g.*, 8 U.S.C. § 1101(a)(43). Alternatively, the Attorney General could designate by regulation particular factors that would render a non-aggravated felony a particularly serious crime for asylum purposes. It is thus notable that the Government makes no serious effort to contest the

---

[2] The Fourth Circuit properly rejected the Government's argument that petitioner failed to exhaust her asylum claim, *see* BIO 26, concluding that Gao "repeatedly challenged" whether her export control conviction constituted a particularly serious crime for purposes of asylum in her motion to the BIA for reconsideration, Pet. App. 13a n.2. Of course, Gao would have had no reason to raise this issue in her initial appeal to the BIA, as the Immigration Judge had ruled in her favor on this point.

petition's arguments regarding the importance of notice of deportation consequences in withholding and asylum cases – particularly those, such as petitioner's, which involve a plea bargain. *See* Pet. 21. The Government's construction runs directly counter to these considerations, as it fails to provide a non-citizen convicted of (or considering a possible plea bargain for) a non-aggravated felony with any guidance as to whether his crime will be considered particularly serious. Any "burden" that arises from that process is the necessary consequence of Congress's determination to subject the Attorney General's discretion to the regulatory process.

5. The petition demonstrated that certiorari is warranted, as in *Abbott*, *supra*, to resolve a conflict between the United States and other Protocol signatories over the construction of the "danger to the community" requirement. As the petition shows, courts in Canada, Australia, and the United Kingdom all require two independent findings – both that a non-citizen has been convicted of a particularly serious crime and that she constitutes a "danger to the community" in the future. *See* Pet. 27 (citing cases).

The Government contends only that the BIA does not "take an approach that is different from" other Protocol signatories, BIO 24, because it considers the predictive value of offenses when it decides whether to categorize a specific type of offense as "particularly serious." BIO 23. But scholars have recognized that the BIA's position "ignore[s] the predominant international law in this area" by, among other things, "conflating the two independent requirements of 'conviction of a particularly serious crime' and

'danger to the community' through the use of a *per se* rule." Kathleen M. Keller, *A Comparative and International Law Perspective on the United States (Non)compliance with Its Duty of Non-Refoulement*, 2 Yale Hum. Rts. & Dev. L.J. 183, 207 (1999).

The Government's construction of the "danger to the community" provision also suffers from the same flaw as its proposed construction of the asylum and withholding provisions: it renders superfluous a portion of the plain text. The Government contends that the "danger to the community" clause has meaning because it "provides the purpose behind the particularly serious crime inquiry"; in the BIA's view, "an alien's past crimes provide an indication of her future dangerousness," such that aliens "convicted of particularly serious crimes are presumptively dangers to this country's community." BIO 23. Not only does the Government fail to grapple with the petition's arguments regarding the plain text, Pet. 28-29, but it also overlooks that the statute requires the Attorney General to "decide[]" or "determine[]" whether an alien "is" or "constitutes" a danger to the community – each verb in the present tense. By contrast, the phrase "having been convicted of a particularly serious crime" is in the past tense, thereby confirming that the present-tense verbs "decides" and "determines" must refer to the "is a danger to the community" clause and require a separate dangerousness determination. Read the Government's way, the statute would require the Attorney General to "decide" something that has already "been" decided in the past, which is no decision at all.

Finally, the Government suggests that even if the withholding and asylum statutes require a prospective, individualized determination of danger to the community, Gao would still be ineligible for such relief because she is a danger to the United States. BIO 27-28.[3] No judge or tribunal, however, has made any such determination; that issue should be litigated on remand.

To the extent that the Government is suggesting that Gao is ineligible because she is somehow a threat to national security, that is not a reason for denying withholding or asylum under the provisions at issue here. Sections 1231(b)(3)(B)(ii) and 8 U.S.C. § 1158(b)(2)(A)(ii) require a determination that the non-citizen is a "danger to the *community of* the United States." The Government does not, and did not below, seriously argue that Gao posed a danger to the community in the future,[4] no doubt because it recognized the futility of such an argument in the face of the recommendation by former U.S. Attorney Paul McNulty that Gao be permitted to remain in the

---

[3] The Government also argues, for the first time in this case, that Gao has not exhausted her administrative remedies with regard to her "danger to the community" argument. BIO 27. This contention has not only been waived but it is wrong: Gao's briefing in the BIA argues that a "*de facto*" finding that she was a "danger to the community" because she had been convicted of a "particularly serious crime" was "nothing more than a circular argument." A.R. 1153.

[4] Rather, the Government argued only that because Gao was convicted of a particularly serious crime, she must be a danger to the community. A.R. 1282.

United States. *See* Pet. App. 111a (statement of Judge Ellis).

To be sure, other provisions of the INA deal with threats to national security. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(iv) (asylum not available when "there are reasonable grounds for regarding the alien as a *danger to the security of the United States*") (emphasis added); 8 U.S.C. § 1231(b)(3)(B)(iv) (same for withholding). If indeed the Government asserts that petitioner poses such a national security threat, petitioner's case would best be addressed under the appropriate statutory provision on remand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Amy Howe
Counsel of Record
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
ahowe@howerussell.com

December 15, 2010